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No. 875

In the Supreme Court of the United States

OCTOBER TERM, 1960

SWIFT & COMPANY, ARMOUR AND COMPANY, and THE CUDAHY PACKING COMPANY, et al.,
APPELLANTS

v.

UNITED STATES OF AMERICA

On Appeal from the United States District Court for the Northern District of Illinois

MOTION TO AFFIRM

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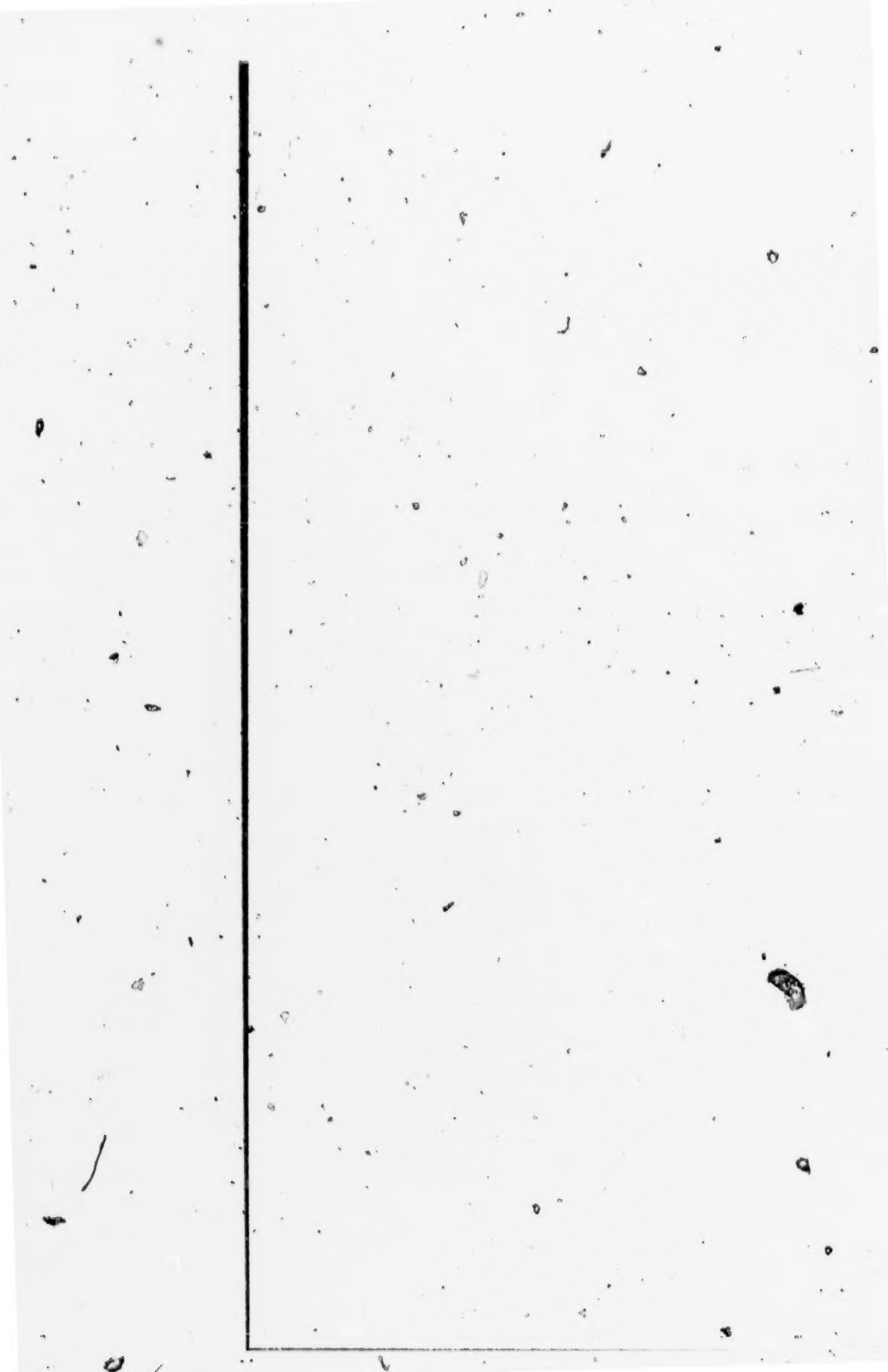
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MOTION TO AFFIRM

The United States moves, pursuant to paragraph 1(c) of Rule 16 of the Revised Rules of this Court, that the judgment of the district court be affirmed.

STATEMENT

This case involves the third attempt by appellants to eliminate the prohibitions of a 1920 consent decree which, in general, precluded the major meat packers from engaging in the manufacture, distribution, and

sale of specified grocery and milk products, as well as from selling their meat products at retail. An attempt to void the decree *in toto* was denied by this Court in *Swift & Company et al.* v. *United States*, 276 U.S. 311. An effort to modify the decree to eliminate these prohibitions was rejected by this Court (to the extent it had not been previously rejected by the district court) in *United States* v. *Swift & Company*, 286 U.S. 106. The present proceeding was initiated in 1956 by motions by three of the four parties to the outstanding consent decree, who claimed that changes in the industrial climate since 1930 had eliminated all continuing need for the prohibitions and that maintenance of these restrictions was causing undue hardship to the appellants. After a full hearing, involving the taking of 8,000 pages of testimony and consideration of nearly 1,000 exhibits, the district court in a comprehensive opinion (J.S.A. 1-57)[1] denied the motions.

1. Following an extensive investigation by the Federal Trade Commission in 1917-18 of the nation's meat slaughtering and packing industry (F.T.C., *Food Investigation: Report on the Meat Packing Industry*, 1919), the United States on February 27, 1920, filed a civil complaint (J.S.A. 58-85) alleging that the five largest meat packing concerns[2] by reason of their size and certain predatory practices had acquired con-

[1] J.S.A. refers to the separate appendix filed with appellants' jurisdictional statement.

[2] The packers were Swift & Co., Armour and Company, Morris & Company (absorbed by Armour in 1923), Wilson & Company, and the Cudahy Packing Company.

trol of the "supply and the price of the food supplies of the nation" in violation of the Sherman and Clayton Acts (J.S.A. 66). Specifically, the complaint charged that the defendants by combination and conspiracy had gained control of the nation's dominant stockyard facilities, the terminal railroads connecting the yards with long-haul rail lines, and the trade newspapers and market journals, and had developed vast nationwide systems of distribution, involving the use of 90% of all available refrigerated rolling stock and great numbers of private and public cold storage facilities. By the use of this control and their own enormous size, it was alleged that the defendants had gradually eliminated their competitors as significant factors in the marketing of livestock and, in order to eliminate competition among themselves, had entered into percentage purchasing arrangements allocating the respective shares of the total supply offered at the various stockyards. Finally, the complaint charged (J.S.A. 78) that the defendants, having destroyed competition in meats, attempted to gain control of non-meat food supplies that might be substituted for the higher priced meat. That objective was sought by the acquisition of a large number of non-meat food concerns and the consummation of a number of exclusive output contracts with other suppliers. In marketing these "substitute" products, the defendants utilized their existing distributive facilities at virtually no increase in overhead or operating expenses and employed their advantages "temporarily to fix prices so low as to gradually eliminate competition" (*ibid.*). The prayer for relief sought, *inter alia*, to

preclude the defendants' use of their distribution facilities to enhance their position with respect to non-meat products (par. IV, J.S.A. 83-84), and, as a separate matter, perpetually to exclude the defendants from engaging in such non-meat activities (par. V, J.S.A. 84).

Although the defendants (on February 27, 1920) filed answers denying the unlawful acts alleged, they simultaneously consented to the entry of a final decree enjoining the companies, *inter alia*, from: (1) using or permitting others to use their distributive facilities for handling certain enumerated non-meat food products (par. Third, J.S.A. 88-89); (2) manufacturing, transporting, wholesaling, or retailing the prohibited items (par. Fourth, J.S.A. 89-93); (3) operating or owning retail meat stores (par. Sixth, J.S.A. 96); and (4) handling or dealing in fresh milk or cream (par. Eighth, J.S.A. 97-98).[3]

2. In 1929, after the basic validity of the consent decree had been sustained by this Court in *Swift & Co. et al.* v. *United States*, 276 U.S. 311 (see also *United States* v. *California Cooperative Canneries*, 279 U.S. 553), petitions were filed by Swift and Armour in what is now the District Court for the District of Columbia seeking substantial modification of the decree because of certain radical and revolutionary changes in economic conditions, merchandising methods, etc. and because of alleged hard-

[3] With the exception of some 30 non-food items, including specified building materials and food-handling equipment (see par. Third, J.S.A. 92-93), the defendants were left completely free to diversify into any non-food field they chose.

ship to the petitioners in not being permitted to use existing distributive facilities for handling the prohibited items. The district court denied the request to permit the retailing of both groceries and meats, but granted the petitions to the extent of permitting the companies to manufacture the prohibited non-meat products and distribute them at wholesale.

On appeal, this Court reversed (*United States* v. *Swift & Co.*, 286 U.S. 106), on the ground that the defendants, who had consented to the restrictions of the decree "with their eyes open" (p. 115), could still use existing facilities to distribute grocery products to the disadvantage of their competitors, and still retained such enormous size as to enable them to "starve out weaker rivals" (p. 116). The growth of the chain stores to "affluence and power" was, the Court held (p. 118), not controlling because they still looked to the defendants, individually and collectively, for substantial portions of their meat requirements, thus affording the defendants "a post of vantage" if permitted to deal in the prohibited lines.

3. The present phase of this litigation began in 1956 when the three appellants filed new petitions for modification of the decree. As the court below indicated, "[t]he underlying theory of [these petitions] is the same as that relied upon in the 1930 petitions * * *" (J.S.A. 26). It was alleged that by reason of substantial changes in the food industry, including the increasing inadaptability of existing distributive facilities to the distribution of grocery and milk products and the continuing ascendancy of the large chains and cooperatives, the 1920 decree was no longer

needed to protect the consuming public from possible competitive abuses but was in fact a positive instrument of wrong, working a financial hardship on the defendants (J.S.A. 26-30).

After a lengthy hearing, the district court rejected appellants' contentions (J.S.A. 1-57). It held that the proper test for determining the modification of antitrust consent decrees, as set out by the Court in the *Swift* case, *supra*, was whether conditions which supported the decree at the time of its entry "have so altered with the passage of time that the restraint can no longer be justified, and that they [the petitioners] are suffering injury, without counterbalancing advantage to the public interest, sufficient to move a court of equity to act" (J.S.A. 43). The court rejected the contention that lack of continuing public need for the restraints of the decree and hardship suffered by the appellants were alternative standards for modification, stating (J.S.A. 40):

> They are rather correlative elements of a single standard. As need is diminished, a lesser showing of hardship will tip the scales in favor of modification, and as the defendants' suffering increases, their burden of showing decreased need is correspondingly lightened.

Applying these criteria to the facts before it, the court concluded that notwithstanding the decree the appellants individually and collectively "remain, to the extent that they were in 1930, the dominating forces in the meat industry" (J.S.A. 53). The undisputed evidence showed that in 1956 the appellants accounted for nearly 40% of the total commercial

slaughter of livestock in the United States (GX 2), with substantial increases since 1920 in every species except cattle (GX 5-A, 5-B, 5-C, 5-D).[4] Between 1929 and 1956, Swift's total sales increased from approximately $1 billion to $2.4 billion and Armour's from approximately $1 billion to $2 billion (GX 12b), each exceeding the total combined sales of the nine largest packers not subject to the decree (*ibid.*). By 1951, Cudahy's total sales had increased from $268 million to $640 million, but by 1956, for reasons not connected with the decree (J.S.A. 56), had declined to $291 million[5] (*ibid.*).[5] In 1956, appellants accounted for 56% of the total assets of the entire meat packing industry (Swift, $561.6 million; Armour, $468.3 million; Cudahy, $56.5) (GX 12). The net worth of Swift and Armour was $378 million and $204 million respectively, compared with $36 million for Oscar Mayer, whose net worth was the greatest of appellants' principal competitors (GX 12d). Each appellant maintained huge reserves of working capital (GX 242-243), and by the magnitude of their advertising and public relations expenditures they have made their names the best known in the meat field

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[4] The total slaughter of all species by Swift and Armour increased from 28.1 million head in 1920 to 33.2 million in 1929 to 42.3 million in 1956 (GX 3). Cudahy's total slaughter increased until 1950 when a period of decline began (*ibid.*).

[5] The evidence showed, however, that in 1959, as the result of reorganization and planned improvements in operating efficiencies, Cudahy's sales had advanced to $352 million (GX 213, Tr. 6067-68, 6076-80), slightly less than the sales of the largest packer not subject to the decree (GX 12b).

(see, *e.g.*, GX 180, 206, 207, 208). Furthermore, unlike any of their principal competitors, the appellants are highly diversified companies producing, in addition to full lines of meats and meat products and permitted grocery items, such diversified goods as pharmaceuticals, chemicals, soaps, salt, additives, fertilizers, cleansers and insecticides (GX 242, 244, 88, 88).

On the basis of this evidence, the district court held that appellants' control over nearly half of the nation's meat supply would give them a substantial advantage over retail competitors if they were permitted to enter this field[6] and that the operation of general retail food stores by the appellants "would tend to restrain competition by providing [them] with captive outlets for both their meats and groceries, to the exclusion of competitive products" (J.S.A. 54). If permitted to engage in general wholesale food operations, the court concluded, appellants would enjoy "the competitive advantages of offering a full line of products and the economies resulting from large volume and combined managerial and sales staffs" (J.S.A. 55).[7]

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[6] In 1956, the large corporate chains did an insignificant amount of their own slaughtering and processing of meats, and continued to rely on the defendants and other packers for their supplies of meat and meat products (GX 205). None of the 2,640 grocery wholesalers, in 1958, engaged in the slaughtering of livestock or the processing of meats (SX 18, GX 201, Tr. 7409, 7431, 928).

[7] While the district court held that appellants' distribution facilities "would not afford any substantial advantage in the distribution of groceries along with meats" (J.S.A. 55), the evidence showed that appellants' branch houses and the

With respect to the correlative question of hardship, the court noted that appellants' profits and rate of growth were lower than those of other concerns in the food industry. But it pointed out that, to the extent that this resulted from prohibitions upon diversification into more profitable lines of endeavor, this was not a new or unforeseen burden, but had been specifically contemplated in framing the decree (J.S.A. 56). Since none of appellants' meat packing competitors had in any substantial degree diversified their activities into other food lines, the court concluded that any competitive difficulties appellants (and particularly Cudahy) had encountered in their meat operations were not attributable to the decree and hence not hardship within the meaning of this Court's decision in *United States* v. *Swift & Co.*, *supra (ibid.)*.

In sum, the district court held that the defendants had failed to meet the burden of showing either the necessary lack of continuing public need for the decree or the degree of hardship which, considered separately or together, would warrant modification of the decree.

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other elements of their vast distributive systems have not been entirely replaced by direct sales from the processing plant to the customer (GX 43, 139, Tr. 4045, 622-24, 742-43, 1645). In 1956, for example, approximately 50% of Armour's sales, including certain non-meat products not in the prohibited category, were made through its branch houses (GX 102a). In many instances, where such intermediate facilities have been closed, specialized sales units have been staffed from their personnel forces (SX 3, 5), with such newly organized units being readily adaptable to the sale of prohibited products at little increase in overhead costs (GX 214, pp. 212, 216; GX 244, pp. 2, 5; Tr. 3151-3152).

ARGUMENT

This is the third time appellants have sought to cancel the provisions of the 1920 consent decree which, by prohibiting the major meat packers from entering major portions of the grocery field, have played such a significant role in keeping these two areas of commerce competitive. The contentions now made are largely variants of those rejected by the Court, in 1932, in *United States* v. *Swift & Co.*, 286 U.S. 106, and the developments since that date, most of which are continuations of trends then clearly visible, call for no different result here. Nor does the decision of the district court rest upon any new principles inconsistent with those established by Mr. Justice Cardozo's landmark opinion in the earlier case. In this light, the questions now presented are so unsubstantial as not to need further argument, and the Court may appropriately grant summary affirmance.

1. The district court found that if the appellants were permitted to operate retail food stores "they would enjoy a substantial advantage over their rivals as a result of their control of nearly half the nation's meats and meat products," and that "[v]ertical integration through acquisition of existing retail stores or chains would tend to restrain competition by providing the defendants with captive outlets for both their meats and groceries, to the exclusion of competitive products" (J.S.A. 54). It also concluded that if the appellants were permitted to sell groceries and milk and cream at wholesale along with their meats "the competitive advantages of offering a full

line of products and the economies resulting from large volume and combined managerial and sales staffs would afford the defendants a competitive advantage similar to that which has largely eliminated the butcher shop, the green grocer, and the bakery shop from the retail trade" (J.S.A. 55). Appellants do not directly challenge the factual validity of either of these two sets of findings.[8] Rather, the suggestion is that the findings cannot support a continuation of the decree's prohibitions because they improperly take account of the vast size of appellants' meat packing enterprises, and rest on considerations not expressly set out in the original 1920 complaint as a basis for the relief requested. Neither of these contentions bears analysis.

(*a*). The alleged irrelevance of appellants' size and position in the meat industry is similar to an argument made and rejected at the time of the 1932 case. As Mr. Justice Cardozo there pointed out, "The original decree * * * was framed upon the theory that even after the combination among the packers had been broken up and the monopoly dissolved, the individual units would be so huge that the capacity to engage in other forms of business as adjuncts to the

[8] While the district court did not in terms address itself to the question whether appellants should be permitted to manufacture the prohibited products, with wholesale and retail distribution being turned over to unaffiliated concerns, it is clear that manufacture cannot be insulated from distribution and that many of the same advantages which the court held would inhere in joint meat-grocery wholesaling or retailing by appellants would likewise be present in the manufacturing situation.

sale of meats should be taken away from them altogether" (*United States* v. *Swift & Co.*, 286 U.S. 106 at 116). Stressing that while "[m]ere size * * * is not an offense against the Sherman Act * * * size carries with it an opportunity for abuse that is not to be ignored when the opportunity is proved to have been utilized in the past" (*ibid.*), the Court stated (at 118), in language which is strikingly parallel to that of the district court here:

> Much is made in the defendants' argument of the rise of the chain stores to affluence and power, and especially of chains for the sale of groceries and other foods. Nothing in that development eradicates the ancient peril. * * * They [the chains] look to the defendants for their meats, and if the ban of this decree is lifted, they will look to the defendants for other things as well. Meats and groceries today are retailed at the same shops, departments of a single business. The defendants, the largest packers in the country, will thus hold a point of vantage, as compared with other wholesale grocers, in their dealings with the chains. * * *[9]

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[9] The court below said in the present case (J.S.A. 55):

> If the defendants were permitted to sell groceries and fresh milk and cream at wholesale along with their meats, the competitive advantages of offering a full line of products and the economies resulting from large volume and combined managerial and sales staffs would afford the defendants a competitive advantage similar to that which has largely eliminated the butcher shop, the green grocer, and the bakery shop from the retail trade.

See also *supra*, pp. 6-8.

(*b*). Nor can it properly be contended that the ability of the large meat packers to utilize "their gigantic size" to conduct price wars or otherwise act so as "to starve out weaker rivals", if they were allowed to reenter the grocery business, was not a significant basis for the prohibitions of the original decree. As the Court said in 1932, "The original decree * * * was framed upon that theory" (286 U.S. at 116). The contention that the separation of meats from groceries rested exclusively or even primarily upon the advantages accruing to the appellants through their then ownership of refrigerated cars and branch houses (allegedly no longer of significance in the distribution of groceries or milk products [10]) is clearly without substance. The *Swift* opinion gave as the "second reason stated in the bill of complaint" "the practice followed by the defendants of fixing prices for groceries so low over temporary periods of time as to eliminate competition by rivals less favorably situated", and expressly held that "to curb the aggressions" of appellants the "privilege [to deal in groceries] should be renounced forever, and this whether the units within the combination [*i.e.*, the individual appellants] were acting collectively or singly" (286 U.S. at 116-117). See also 286 U.S. at 118-119.

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[10] However, appellants admitted at page 32 of their instant Motion and Petition for Modification that their motor transportation facilities could be advantageously utilized on the return trip from meat delivery points for transporting grocery products to processing plants.

In addition, it should be pointed out that the district court in the earlier case had relieved appellants from the injunctions of Paragraph Three of the decree (J.S.A. 88-89), precluding the use of their distributive facilities for the prohibited non-meat products, on the ground that refusal to permit them to make use of unneeded capacity was unduly harsh. In view of this holding, this Court naturally devoted special attention to that part of the decree and the specific allegations of the complaint directed thereto. But, as the court below pointed out, the decree is not limited to prohibiting the use of appellants' special distributive resources for non-meat products. Instead, it contains a separate provision (Paragraph Four (J.S.A. 89-93)) which, aside from the special problems arising out of the distribution facilities, totally and permanently barred the appellants from ever again entering these fields, *even after they disposed of the surplus or "obsolete" distribution facilities as contemplated by Paragraph Three* (J.S.A. 89). It is clear therefore that the distribution facilities aspect of the decree was not the sole or primary basis for the prohibition on appellants engaging in the prohibited non-meat activities, and the asserted elimination of these particular advantages does not require modification of the basic limitations.

2. Appellants also contend that the district court improperly went behind the complaint in determining the basis and objective of the provisions of the decree which they seek to modify. But their unsupported assertion that the reason for or purpose of a provision can only be ascertained through examina-

tion of the specific claims of violation or impropriety set forth in the complaint is without any merit. As this Court has held, relief in an antitrust suit "is not limited to prohibition of the proven means by which the evil was accomplished, but may range broadly through practices connected with acts actually found to be illegal. Acts entirely proper when viewed alone may be prohibited". *United States* v. *U. S. Gypsum Co.*, 340 U.S. 76, 88-89. See *International Salt* v. *United States*, 332 U.S. 392, 400-401. Thus, the fact that the complaint specifically refers to only *one* means by which the appellants set about "controlling the nation's supplies of" the prohibited non-meat products (J.S.A. 78), does not indicate that the injunctive relief to which they agreed was aimed solely at eliminating that particular abuse.[11] This is made clear in the complaint itself, for the prayer for relief (J.S.A. 83-84), like the resulting decree (J.S.A. 88-93), contains separate paragraphs relating first to the need for precluding the use of appellants' meat distribution facilities for handling any of the prohibited non-meat products and then to the more comprehensive need for perpetually excluding appellants from manufacturing, distributing, or selling such products. The district court here, like this Court's opinion before it (see, *e.g.*, 286 U.S. at 116-119), was thus clearly correct in looking beyond the narrow

[11] As the district court pointed out below (J.S.A. 47), under appellants' thesis, there could be no explanation for paragraph six of the decree prohibiting their ownership or operation of retail meat markets—a subject not directly referred to in the complaint.

specifications of particular past abuses, as set forth in the complaint, in evaluating whether the need for the broader injunctive provisions of the decree has been "attenuated to a shadow" (286 U.S. at 119).

3. Appellants likewise urge that the district court misconstrued the 1932 opinion of this Court in holding that lack of continuing need for a decree's prohibitions and the hardship its maintenance imposes upon the consenting parties are "correlative elements of a single standard" (J.S.A. 40), rather than alternative bases for modifying the decree. Since the court below found that appellants had shown neither a lack of continuing need for the contested provisions (J.S.A. 55) nor that they imposed any "new or unforeseen" hardship in the sense required by the *Swift* decision (J.S.A. 56), it would not appear that any question as to the applicable standard for modification is now presented to the Court.

It is perfectly clear, morever, that this Court's decision in *United States* v. *Swift*, *supra*, does not establish alternative paths for securing relief from a decree's prohibitions. Instead, the opinion phrased the issue in terms of whether "the restraints of the injunction, however appropriate and just in February 1920, were now useless and oppressive" (286 U.S. at 113). The district court may be correct in concluding that this and other language of the opinion shows that the Court would not require a party to show both that there is no continuing need for a prohibition *and* that it causes "hardship so extreme and unexpected as to justify [a court] in saying that they are the victims of oppression" (p. 119). But

nothing in the earlier opinion justifies a reading under which either path, considered alone, could properly lead to eliminating a prohibition to which the appellants had previously agreed.

4. Finally, appellants argue (J.S. 28-29) that the district court erred "by concluding that appellants are not entitled to relief because they bargained away their right to modification so long as they retain their size as meat packers". But the court did not conclude that appellants had bargained away their right to any modification fully justified by subsequent circumstances, but only that their consent to a broad prohibition against *any* future participation in certain fields of endeavor had estopped them from arguing that the decree's prohibitions had a narrow objective already accomplished. In so holding, the court merely echoed this Court's opinion in the prior *Swift* case. This Court stated, "[w]e do not turn aside to inquire whether some of these restraints upon separate as distinguished from joint action could have been opposed with success if the defendants had offered opposition. Instead, they chose to consent, and the injunction, right or wrong, became the judgment of the court" (286 U.S. at 116-117). Similarly, the opinion indicated, "[w]isely or unwisely, they [appellants] submitted to these restraints upon the exercise of powers that would normally be theirs. They chose to renounce what they might otherwise have claimed, and the decree of a court confirmed the renunciation and placed it beyond recall" (p. 119). This language is directly apposite to refute appellants' repeated

contentions that they are being excluded from lawful activities.

Neither the *Swift* opinion nor the ruling below suggests, however, that the consent nature of the decree necessitates any greater showing of lack of continuing need or hardship than would have been required in the case of a litigated decree. For this reason, this Court's recent decision in *System Federation No. 91, Railway Employes' Department* v. *Wright*, 364 U.S. 642, is not inconsistent with the decision below in stressing that a party consenting to an equity decree does not thereby preclude himself from seeking modification under changed circumstances. Appellants admit (J.S. 28) that the district court here reached a similar conclusion (see J.S.A. 37).

CONCLUSION

The district court's opinion refusing to modify the consent decree, so as to allow the major meat packers now to enter the grocery and milk businesses and to sell their products at retail, rests upon a proper and permissible evaluation of the evidence under the standards laid down by this Court in construing this same decree in *United States* v. *Swift & Co.*, 286 U.S. 106. Appellants present no significant question of law not previously resolved. The judgment of the court below should accordingly be affirmed.

Respectfully submitted,

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